Discrimination Claims Under Title VII: Where Mandatory Arbitration Goes Too Far

I. INTRODUCTION

Arbitration has become one of the most widely used alternative dispute resolution mechanisms. Through the adoption of the Federal Arbitration Act ("FAA") in 1925, Congress intended to make it clear that the resolution of disputes by arbitration was no longer to be disfavored by the judiciary, but to be a favored alternative.[1] Far from disfavoring it, modern judicial entities have embraced arbitration as courts try to deal with crowded dockets and more complex, lengthy litigation.[2] Since the enactment of the FAA, courts have become more permissive with respect to the kinds of disputes in which they will allow settlement by arbitration. The United States Supreme Court has followed this trend, ruling in a series of cases that the right to a judicial forum for many federally created statutory rights can be waived by contractually agreeing to submit any dispute to binding arbitration.[3] This Note will address the issue of whether rights under Title VII of the Civil Rights Act of 1964[4] are important enough that an agreement to arbitrate will not preclude an employee's right to enforce them through a trial de novo.

The analysis of this question will begin by focusing on cases decided by the Supreme Court which developed the criteria for determining what statutory rights are beyond the reach of binding arbitration agreements. These tests will then be applied to the statutory rights supplied by Title VII of the Civil Rights Act of 1964 (the Act) using a 1974 Supreme Court decision, *Alexander v. Gardner-Denver Co.*,[5] and a recent Fifth Circuit Court of Appeals case, *Alford v. Dean Witter Reynolds, Inc.*[6] In *Alford*, the United States Court of Appeals for the Fifth Circuit, on remand from the Supreme Court, reversed its earlier decision and held that contractual agreements to arbitrate disputes, including those involving Title VII rights, are enforceable. This Note will question whether the Fifth Circuit should have overruled its prior decision in the *Alford* case, and suggest that, absent an explicit ruling by the Supreme Court, agreements to arbitrate such as the one in *Alford* should

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1. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

2. Note, *Agreements to Arbitrate Claims under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568 (1990).

3. *See infra* note 12 and accompanying text.

4. 42 U.S.C. § 2000e - 2000e-17 (1982).

5. 415 U.S. 36 (1974).

6. 939 F.2d 229 (5th Cir. 1991).

not be enforceable.

II. BACKGROUND - THE SUPREME COURT'S CRITERIA FOR DETERMINING WHICH STATUTORY RIGHTS ARE ENTITLED TO A JUDICIAL FORUM

The global trend toward alternative dispute resolution has been reflected clearly in recent decisions by the Supreme Court expanding the scope of the FAA.[7] The FAA was passed in 1925 to reverse the traditional judicial hostility toward arbitration agreements[8] by providing that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[9] For many years the FAA was found to apply only in the federal courts, and was thus only important in cases involving diversity or admiralty jurisdiction.[10] By 1953, it was established that the FAA extended to controversies involving federal statutory rights, although courts still tended to view the competence of arbitration proceedings with suspicion. By 1983, the Court had clearly established the presumption of arbitrability, noting that the FAA "establishes that, as a matter of federal

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7. Michael Lieberman, *Overcoming the Presumption of Arbitrability of ADEA Claims: The Triumph of Substantive over Procedural Values in* Nicholson v. CPC International, Inc. 138, U. PA. L. REV. 1817, 1822 (1990).

8. The House Report accompanying the bill states: "[t]he need for the law arises from . . . the jealousy of the English courts for their own jurisdiction. . . . This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts." H.R. REP. NO. 96, 67th Cong., 4th Sess., pt. 6 at 1-2 (1924). A typical pre-FAA case is Hamilton v. Home Insurance Co., 137 U.S. 370 (1890), where the Court held that a contractual agreement in a fire insurance policy to submit the question of damages to arbitrators was held not to bar a judicial action on the same issue.

9. The FAA provides in part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1982).

10. Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law,* 71 VA. L. REV. 1305, 1311 n.29 (1985).

law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[11] Under this jurisprudence, disputes involving federal statutory rights under RICO, the Securities Act of 1934, and the Age Discrimination in Employment Act have been compelled to binding arbitration pursuant to a contract.[12] But, as the Court recognized in *Gilmer v. Interstate/Johnson Corp.*,[13] "all statutory claims may not be appropriate for arbitration."[14] There remains, therefore, the question of which statutory claims are not appropriate in the opinion of the Supreme Court.

As cases came before the Supreme Court asserting that various federal statutory rights were not appropriate for mandatory arbitration, the Court developed two criteria for determining which statutory rights would qualify. The original criterion was evidence of Congressional intent to preserve a judicial forum. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[15] the Court explained:

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, the intention would be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.[16]

The Court expanded the test when it set forth a second criterion by which a statutory right could be considered exempt from a contractual agreement to arbitrate. In *Shearson/American Express, Inc. v. McMahon*,[17] the Court stated that an intent to limit or prohibit waiver of a judicial forum could also be deducible "from an inherent conflict between arbitration and the statute's underlying purpose."[18] Thus, after

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11. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

12. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (RICO and the Securities Act of 1934); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (antitrust); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (FLSA).

13. 111 S. Ct. 1647 (1991).

14. *Id.* at 1652.

15. 473 U.S. 614 (1985).

16. *Id.* at 628.

17. 482 U.S. 220 (1987).

18. *Id.* at 227.

Shearson/American Express there are two tests for determining whether a federal statutory right is exempt from arbitration: first, can Congressional intent to preclude binding arbitration of the statutory right be found in the text or legislative history of the statute; second, is there an inherent conflict between arbitration and the statute's underlying purpose?

III. THE "CONGRESSIONAL INTENT" TEST APPLIED TO THE CIVIL RIGHTS ACT OF 1964

A. Intent in the Text of the Statute

It would be difficult to show from the text of the statute that Congress intended to preclude judicial waiver of Title VII rights in favor of arbitration, since there is no reference to arbitration in the statute itself.[19] The enforcement provision of Title VII reflects Congressional concern that employers be allowed to make non-discriminatory business decisions with respect to employees. This concern "led Congress to compound the inevitable complexities of the Civil Rights Act of 1964."[20] The result is a lengthy enforcement provision, which provides for enforcement by the Equal Employment Opportunity Commission (EEOC), the Attorney General, and the individual grievants themselves.[21] Although nowhere in this comprehensive provision is there any mention of precluding arbitration, it should be noted that no jurisprudence with respect to arbitration had been developed when the Act was passed.[22]

Courts therefore cannot accept the absence of a clause prohibiting arbitration in the enforcement provision as evidence that Congress did not intend to preclude mandatory arbitration of Title VII disputes, for the Supreme Court has said that a court, when interpreting a statute, "must

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19. The enforcement provision of Title VII is set out at 42 U.S.C. 2000e-5. The Civil Rights Act of 1991 does acknowledge the use of arbitration, stating that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. No. 102-166, 105 Stat. 1071, 1081 (1991). How much this changes the existing relationship between Title VII and arbitration is debateable. The cases and legislation suggest that, with respect to Title VII, arbitration is *not* appropriate or authorized by law.

20. Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430 (1965).

21. 42 U.S.C. § 2000e-5(f) (1982).

22. Nicholas W. Lobenthal, *The Arbitrability of ADEA Claims: Toward an Epistemology of Congressional Silence*, 23 COLUM. J. L. & SOC. PROBS. 67, 80 (1989).

take into account its contemporary legal context."[23] What the enforcement provision does indicate is that by offering an array of enforcement mechanisms, Congress intended that a grievant have as many fora as possible for pursuing his claim. Forcing the grievant to arbitrate is therefore not consistent with the enforcement provisions of Title VII.

There is language from which an inference can be drawn that Congress intended to preserve a judicial forum for Title VII claims. Without addressing the issue of alternative fora specifically, the text of the statute does provide that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter."[24] While this language is strong evidence of an implied Congressional intent for the federal courts to have final jurisdiction, without any specific mention of arbitration in the text, the legislative history must be examined to find the intent of Congress.

B. Intent in the Legislative History

Determining the intent of Congress through the legislative history of the Civil Rights Act presents some problems. The volume of legislative history generated by this Act is such that it is difficult to ascertain anything but broad areas of intent. In addition, many have questioned the value of using legislative history to determine the intent of the drafters of a statute.[25] Despite these problems, the same Court that proposed the "legislative history" test made its own determination of the legislative history of Title VII in *Alexander v. Gardner-Denver Co.*[26] The Supreme Court's analysis of Title VII rights in this case clearly shows that the statute provides the type of rights that meet one or both of the tests established, and thus requires a judicial forum for their resolution.

The issue in *Alexander* was whether submission of a Title VII discrimination claim to arbitration, pursuant to a collective bargaining agreement, foreclosed the right to a judicial forum for the same grievance. Harrell Alexander worked for the Gardner-Denver Co., whose employees

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23. Cannon v. University of Chicago, 441 U.S. 677, 699 (1979).

24. 42 U.S.C. § 2000e-5(f)(3) (1982).

25. Frank Easterbrook has noted that "the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process . . . [b]ecause legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes." Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV., 533, 544, 547 (1983).

26. 415 U.S. 36 (1974).

were covered under a collective bargaining agreement that had been negotiated by the employees' union. Alexander was fired, and he filed a grievance claiming he was unjustly discharged.[27] Before his case proceeded to arbitration, Alexander raised the claim that his dismissal was the result of racial discrimination. He also filed a separate charge of discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission (EEOC). The arbitrator found that Alexander had been discharged for cause, and the EEOC found that there was no reasonable cause to believe that there had been a violation of Title VII. Alexander then filed his action in the United States District Court for the District of Colorado.[28] The district court granted summary judgment to Gardner-Denver, finding that Alexander, having submitted the issue to an arbitrator, was bound by the arbitrator's decision. The Court of Appeals for the Tenth Circuit affirmed on the same basis.[29] On appeal, the Supreme Court reversed this decision, holding that an employee's statutory right to a trial de novo under Title VII was not foreclosed by prior submission of his claim to final arbitration.

In finding that a grievant does not forfeit his right of action by submitting to arbitration, the Court looked at the legislative history of Title VII and determined "that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims."[30] In their analysis of the issue, the Court determined Congressional intent relating to several aspects of Title VII. They found that the lengthy enforcement provisions of Title VII were promulgated to "allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination."[31] Apparently the Court felt that Congressional support of the Civil Rights Act was so strong that its intention was to provide as much power of enforcement as it could. The Court reinforced this notion by holding that the doctrine of election of remedies (on which the district court had relied in part in enforcing the arbitrator's decision) had no

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27. At this time, Alexander made no claim of race discrimination, which was brought up for the first time in the last step of a multi-stepped grievance procedure that preceded arbitration.

28. Alexander v. Gardner-Denver Co., 346 F. Supp. 1012 (1971).

29. Alexander v. Gardner-Denver Co., 466 F.2d 1209 (1972).

30. Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974). The Court adds, "[i]t is the duty of the courts to assure the full availability of this forum." *Id.*

31. *Id.* at 48-49.

application in this context because the employee's statutory rights under Title VII were separate from his contractual right to arbitration.

With respect to the question of who is to be the final adjudicator, the Court found that "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."[32] The Court in this case clearly found Congressional intent to both maintain multiple fora and provide for the federal courts to be the final decision makers.

C. The Recent Treatment of the Findings in Alexander

Notwithstanding this clear enunciation of Congress' intent as to the importance of the rights granted by the Civil Rights Act, the Fifth Circuit Court of Appeals, on remand from the Supreme Court in *Alford v. Dean Witter Reynolds, Inc.*,[33] held an agreement nearly identical to the one in *Alexander* to be enforceable. As a condition of her employment as a stock broker with Dean Witter, Joan Alford signed a registration agreement with the New York Stock Exchange and the National Association of Securities Dealers. The agreement contained a broad arbitration clause stating that she agreed to submit any controversy arising out of her employment to arbitration. After being fired, Alford brought a Title VII suit alleging sex discrimination and sexual harassment. Defendant filed a motion to dismiss the suit and compel arbitration, pursuant to the registration agreement. In his opinion for the District Court for the Southern District of Texas, Judge Hittner held that the arbitration clause could not be enforced to compel arbitration of a Title VII discrimination claim. Summarizing the two tests for arbitrability noted earlier, the district court found that "[t]he court in *Alexander* examined the intention of Congress in passing Title VII and found not only that Congress intended the federal courts to exercise final responsibility for the enforcement of Title VII, . . . but also that there was inherent conflict between arbitration and the congressional purpose of Title VII."[34]

The United States Court of Appeals for the Fifth Circuit affirmed. The court noted that "as a matter of federal law [under the FAA], any doubts concerning the scope of arbitral issues should be resolved in favor

32. *Id.* at 56.

33. 939 F.2d 229 (5th Cir. 1991).

34. Alford v. Dean Witter Reynolds, Inc., 712 F. Supp. 547, 548 (S.D. Tex. 1989).

of arbitration."[35] The court also recognized recent Supreme Court cases holding that contractual provisions for arbitration of various federal statutory rights were enforceable.[36] The court held, however, that the Supreme Court's holding in *Alexander* governed their decision, and that persons bringing suits under Title VII would not be held to compulsory arbitration agreements that were part of an employment contract.

The case reached the Supreme Court,[37] which ordered the Fifth Circuit to reconsider *Alford* in light of its recent decision in *Gilmer v. Interstate/Johnson Lane Corp.*[38] In *Gilmer*, the plaintiff also signed a registration application with several securities exchanges, which required him to submit any controversy regarding his employment to arbitration. The registration agreement was basically the same as the one signed by Joan Alford with respect to the issue of arbitration. Gilmer's employment was terminated in 1987, when he was 62 years old. The Court held that the plaintiff's claim under the Age Discrimination in Employment Act (ADEA) was subject, under the FAA, to compulsory arbitration pursuant to his broker registration application. Gilmer conceded that there was nothing in the text or legislative history of the ADEA that would indicate an intent to preclude arbitration. The decision therefore rested entirely on Gilmer's claim that compulsory arbitration would be inconsistent with the underlying purpose of the ADEA.[39]

Gilmer had set forth several arguments asserting that there was an inherent inconsistency in mandating arbitration for ADEA cases.[40] The Court dismissed these challenges by noting that the ADEA and its goals were much like those of other statutes that had been held to be arbitrable. Also noted was the fact that the recent arbitration decisions by the Court have held these procedural safeguard arguments insufficient to preclude arbitration of the claim.[41]

Gilmer also relied on *Alexander* as holding that the arbitration of employment discrimination was precluded. The Court distinguished

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35. Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 105 (1990)(quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

36. Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (securities claims); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (RICO and Securities Exchange Act § 10(b)); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (antitrust).

37. Dean Witter Reynolds, Inc. v. Alford, 111 S. Ct. 2050 (1991).

38. 111 S. Ct. 1647 (1991).

39. *Id.* at 1652.

40. *Gilmer* raised a "host of challenges," including arbitrator bias, limited discovery, and lack of written opinions. *Id.* at 1654-55.

41. *Id.* at 1654.

Alexander by pointing out that the issue in that case was whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance.[42]

D. The 5th Circuit's Response to Gilmer

On remand, with orders to reconsider *Alford* in light of the findings in *Gilmer*, the Fifth Circuit reversed its original opinion, and held that the arbitration clause was enforceable. Although the court acknowledged that *Alexander* stood for the fact that federal courts had been assigned plenary power over Title VII cases, they concluded that "[b]ecause both the ADEA and Title VII are similar civil rights statutes . . . we have little trouble concluding that Title VII claims can be subjected to compulsory arbitration."[43] This opinion, the first federal appellate court opinion to subject Title VII claims to compulsory arbitration, contains a cursory one page analysis.

The Fifth Circuit failed to consider the "legislative intent" test set out by the Supreme Court, which Title VII was found to satisfy in *Alexander*, and which was not considered by the Court in *Gilmer*. The Court's rationale that Title VII and the ADEA are "similar statutes" overlooks not only important differences between the Acts, but the fact that the opinion in *Gilmer*, an ADEA case, did not even address the issues crucial to the resolution of a Title VII case.

The *Gilmer* Court did not discuss the language in *Alexander* indicating that Title VII rights are important enough to make it "plain that federal courts have been assigned plenary powers to secure compliance with Title VII."[44] Although this would seem to be an issue the *Gilmer* Court should have addressed, the simple explanation for the lack of discussion of this issue is that Congressional intent regarding the ADEA and Title VII was not even an issue in *Gilmer*. Gilmer conceded that nothing in the text of the ADEA or the legislative history would preclude the use of arbitration to enforce the contractual provisions at issue. The Court granted certiorari in *Gilmer* "to resolve a conflict among the Courts of Appeals regarding the arbitrability of ADEA claims."[45] There is no such conflict between the Courts of Appeals with respect to the

42. *Id.* at 1656.

43. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991).

44. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

45. *Gilmer*, 111 S. Ct. at 1651.

arbitrability of Title VII discrimination claims.[46] *Gilmer*, therefore, cannot be read to overturn the reasoning in *Alexander*, given that the central issues in the two cases were unrelated.

The Fifth Circuit should have considered that, in distinguishing *Alexander* simply as a case involving collective bargaining, the Supreme Court engaged in a very superficial analysis. Although the facts of *Alexander* were in the context of a collective bargaining agreement, the fact that the Court distinguished *Alexander* as a collective bargaining case cannot be read to require a judicial forum only when the agreement to arbitrate is reached via collective bargaining. The analysis in *Alexander* centered on whether Congress evinced an intent to preserve judicial remedies, in addition to other remedies, whether they be provided for by statute or agreed to by contract. The *Alexander* Court reached its conclusions without relying on the fact that the arbitration in question was pursuant to a collective bargaining agreement. The concern that arbitration in the collective bargaining context may not protect the rights of individual employees was relegated to one footnote in the opinion.[47]

In the final analysis, the first *Alford* decision, a Title VII case, was based on a Supreme Court case where the *intent* of Congress was determined to include preservation of a judicial forum for *Title VII* disputes. The Fifth Circuit has reversed this decision, based on a Supreme Court case where the intent of Congress was not an issue and where Title VII was not involved.

The fact that the Supreme Court remanded *Alford* to be reconsidered in light of *Gilmer* did not require the Fifth Circuit to reverse their decision. A more thorough analysis of the differences between the cases would have been in order. Certainly, the *Alford* court's cursory treatment, calling the ADEA and Title VII "similar statutes," ignores significant differences between the Civil Rights Act of 1964 and the ADEA with respect not only to their legislative histories, but their judicial histories as well.

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46. As the Fifth Circuit itself noted, "we regard *Alexander's* rationale as broad enough to speak to any arbitration of Title VII claims. Two other circuits have already so held. (citations omitted) No circuit court has held otherwise." Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 106 (1990).

47. Lieberman, *supra* note 7, at 1833. *See also* Swenson v. Management Recruiters Intern. Inc., 858 F.2d 1304, 1306 (1988) where the court reasoned that "[a]lthough *Alexander* involves a collective bargaining agreement, and not a commercial arbitration agreement under the FAA, this fact should not change the Court's analysis. . . . That decision turned not on the fact that a collective bargaining arbitration was involved, but instead on the unique nature of Title VII."

IV. THE "INHERENT CONFLICT" TEST APPLIED TO THE CIVIL RIGHTS ACT OF 1964

In addition to legislative statements that Congress intended to preclude Title VII cases from mandatory arbitration, there is ample evidence suggesting that there exists an inherent conflict between arbitration and the underlying purpose of the Civil Rights Act. Since an inherent conflict is present, Title VII satisfies the second criterion established by the Supreme Court (although a statute does not have to satisfy both in order to be "protected").

The arbitration of Title VII claims undermines the investigatory and enforcement mechanisms of the Civil Rights Act, which provides that the EEOC be notified and given an opportunity to remedy the discrimination before an individual grievant has the right to file a civil suit.[48] The Court of Appeals for the Third Circuit has noted that "[a]ny procedure that detracts from the EEOC charge requirement would undermine Congress' design, since the charge not only informs the EEOC of the particular discrimination, but may also identify other unlawful practices."[49] The court recognized that one of the purposes of the Civil Rights Act was to rid society of discrimination, not necessarily to provide redress for individual cases.[50] Allowing discrimination cases to be submitted to arbitration rather than brought to the attention of the EEOC impairs a major function of the Act: to provide for the investigation and remedy of discriminatory employment practices. A case that goes to arbitration will not be brought to the attention of the EEOC, and a valuable opportunity for remedying other instances of discrimination is lost. The Court in *Alexander* recognized the remedial aspect of Title VII when it stated that "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory practices."[51]

The argument that mandatory arbitration usurped the authority of

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48. 42 U.S.C. § 2000e-5(b) provides: "Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, . . . the Commission shall serve a notice of the charge . . . within ten days and make an investigation thereof."

49. Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 227 (1989).

50. One commentator has suggested that "public policy should prevent enforcement of arbitration agreements when the dispute involves statutes or other legal rules designed to achieve ends other than doing justice between the parties to a dispute." Stewart E. Sterk, *Agreements to Arbitrate: The Public Policy Defense*, 2 CARDOZO L. REV. 481, 543 (1981).

51. Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

a federal regulatory agency was countered by the Court in *Gilmer*[52] by asserting that "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration."[53] It analogized to the Securities and Exchange Commission, which is instrumental in enforcing the Securities Acts, which the Court has explicitly held to be appropriate for arbitration.[54] There is, however, a fundamental difference between the operation of the EEOC and the SEC. The EEOC *requires* notification by a grievant before the individual is allowed to initiate a lawsuit, whereas the SEC does not. If arbitration is compelled, there will be no incentive to file with the EEOC, which has a right to discover and remedy the situation.[55]

The Court tries to lessen the importance of this fact in *Gilmer* by pointing out that a grievant is always free to file a charge with the EEOC, even if he is not able to file a civil action. This rationalization overlooks an obvious purpose of requiring notification -- Congress thought that people would not voluntarily report abuses to the EEOC. Making notification mandatory ensures that the agency responsible for monitoring and remedying discrimination in the workplace is made aware of instances of discrimination. Involvement by the EEOC is crucial, for instance, where there is a pattern of discrimination by one employer or industry. Notification by an individual is the necessary first step of the process of investigating and rectifying other violations by the same employer. Allowing a grievant with a discrimination claim to go to arbitration, whether it be mandatory or not, circumvents the only process by which the government can discover other cases of discrimination.[56]

The structure of the Civil Rights Act enforcement mechanism also suggests that restricting a grievant to only one remedial forum is contrary to the underlying purpose of the Act. Title VII gives federal courts broad remedial powers. These powers can be exercised whether or not the EEOC finds reasonable cause to believe a violation has occurred. This overlapping system of remedies shows strong Congressional intent to provide victims of discrimination with multiple fora.[57] This goal would clearly be frustrated by leaving grievants with only one choice in

52. The argument in *Gilmer* was in the context of the ADEA, which is also enforced under the direction of the EEOC.

53. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1653 (1991).

54. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987).

55. 42 U.S.C. § 2000e-5(f)(1) (1982).

56. *See* Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 227 (3d Cir. 1989).

57. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-47 (1974)("legislative enactments in this area [Title VII] have long evinced a general intent to accord parallel or overlapping remedies against discrimination.")

arbitration.

There are also procedural limitations to arbitration that may hamper enforcement by the EEOC -- arbitrators may lack equitable powers to prohibit future discrimination, and may not be able to deal with a situation involving a large plaintiff group. Again, the adjudication of a Title VII claim serves not only to redress the harm to the grievant, but provides a chance for the EEOC to examine the employer's practices to determine if other similar cases exist. Arbitration is poorly suited for this function, since an arbitrator hears only single cases, and the arbitrator's remedial powers are limited to that case.[58] Similarly, arbitrators are powerless to issue injunctions. Indeed, Justice Stevens reminded the Court of the federal court's injunctive powers in his *Gilmer* dissent: "[a]s this Court previously has noted, authorizing the courts to issue broad, injunctive relief is the cornerstone to eliminating discrimination in society."[59]

The Court in *Alexander* noted several reasons why arbitration would be inappropriate for resolution of Title VII claims. One concern was that an arbitrator's expertise is usually in the rules of the industry, not the resolution of statutory or constitutional issues.[60] Other concerns included: the fact that the record of the proceedings is not complete; the usual rules of evidence do not apply; and the rights provided by the rules of civil procedure are not available.[61] This reasoning has usually been dismissed by more recent court decisions, which have read this part of the opinion as simply reflecting the Court's outdated suspicions of the arbitral process.[62] In a recent case, when a grievant attempted to raise the lack

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58. G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?* 68 TEX. L. REV. 509 (1990).

59. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1660 (1991)(Stevens, J., dissenting).

60. *Id.* at 1657.

61. *Id.*

62. In *Gilmer*, plaintiff raised a "host of challenges to the adequacy of arbitration procedures." The Court responded:

> Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of our federal statutes favoring this method of resolving disputes."

Id. at 1654 (quoting Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).

of procedural safeguards as part of his case, the Court disregarded this argument because the competence of arbitrators and the Court's confidence in their ability has increased dramatically since *Alexander* was decided.[63]

Rather than simply reflecting a suspicion of arbitrator competence, the Court's reasoning in *Alexander* may also be read as questioning whether arbitration, however proficient, is adequate to provide the kind of enforcement of civil rights that Congress intended. The opinion recognized that arbitral procedures, while well suited to the resolution of contract disputes, were "a comparatively inappropriate forum for the final resolution of rights created by Title VII."[64] This assertion of arbitration's inappropriateness in the Title VII context does not seem to be grounded on a suspicion of arbitral competence, but on a concern that discrimination claims are better suited for the courtroom.

Admittedly, many of the same arguments were made and rejected by the Court against the enforcement of arbitration agreements related to ADEA claims in *Gilmer*. It is arguable however, that rights relating to race and sex discrimination should be given a higher level of protection than age discrimination claims. Notwithstanding the fact that the ADEA and Title VII are completely different statutes with different legislative histories, many authorities, including the Supreme Court, believe there is something more invidious about race and sex discrimination than there is about age discrimination. The Court has in principle agreed that a difference in treatment may be acceptable, noting that the elderly have not been subject to a history of bias like victims of sex and race discrimination.[65] The relative importance of the rights involved in these statutes can be implied by the fact that racial classifications are subject to "strict scrutiny" by the Court, while sex classifications are given an intermediate review. Age classifications, however, "are not treated as suspect or even deserving of the middle standard of review used in gender discrimination cases."[66] In all of its analyses, the Court has treated age discrimination as less harmful than sex and race discrimination.

There are other points made in *Alexander* which the *Gilmer* case

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63. *See Rodriguez*, 490 U.S. at 483.

64. Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974).

65. The Court has stated that "[w]hile the treatment of the aged in this nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976). For an analysis of why classifying people according to age is less invidious, see Peter Schuk, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 33-38 (1979).

66. JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 583 (4th ed. 1991).

did not address, and which demonstrate the Court's belief that Title VII rights should be treated differently than other federally granted statutory rights. The *Alexander* Court asserted that an employee cannot prospectively waive his rights under Title VII. These rights, in the Court's view would include the employee's cause of action under that Title.[67] The *Gilmer* Court, in dismissing the prohibition against waiver of rights, fell back on the fact that the *Alexander* case was in the context of a collective bargaining agreement. There is nothing in the *Gilmer* opinion to indicate that reasoning was meant to apply only to contracts entered into under collective bargaining agreements. Like much of the *Alexander* opinion, it is a statement of the Court's determination of the intent of Congress with respect to enforcement of the Civil Rights Act. The logic is just as applicable to the plaintiff in *Alford*, who, pursuant to an employment contract, prospectively waived her right to a judicial forum for resolution of a dispute concerning her right to be free from discrimination.

V. SUMMARY/CONCLUSION

The Supreme Court has held that some statutory rights are beyond the scope of binding arbitration agreements. One test is that Congress evince an intent to protect those rights from judicial waiver. The Court itself found intent with respect to Title VII rights in *Alexander*. In that same case, the Court demonstrated why arbitration was not compatible with the enforcement of those rights, satisfying the second test the Court established. Without discussing these points beyond saying that ADEA and Title VII are "similar civil rights statutes," the Fifth Circuit relying on a case that did not even put the intent of Congress in issue, has become the first appeals court to hold that an employee can waive the right to a judicial forum to enforce Title VII violations. In doing so, the court has compromised an important tool for remedying discrimination in our society. The fact that the decision was made with no analysis of the issues involved also does a disservice to those who legislated and, over the years, upheld, the right of a victim of discrimination to have access to a judicial forum.

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67. *Alexander*, 415 U.S. at 51.